

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

Case No. 11-51001

BRUEMMER DEVELOPMENT, LLC,

Chapter 7

Debtor.

Judge Thomas J. Tucker

TIMOTHY J. MILLER, TRUSTEE,

Plaintiff,

v.

Adv. Pro. No. 13-4414

SHAUN BRUEMMER,
et al.,

Defendants./Third
Party Plaintiffs,

v.

DENNIS WHEDON,

Third Party Defendant.

**ORDER REQUIRING THIRD PARTY PLAINTIFFS AND THIRD PARTY
DEFENDANT TO SHOW CAUSE IN WRITING WHY THE COURT SHOULD NOT
DISMISS ALL OF THE THIRD PARTY CLAIMS IN THIS ADVERSARY
PROCEEDING, FOR LACK OF SUBJECT MATTER JURISDICTION**

On May 7, 2014, the Court held a hearing on the Third Party Defendant's motion for summary judgment (Docket # 87, the "Motion"). The Court is currently scheduled to issue a bench opinion on the Motion on June 25, 2014. The Motion does not raise any issue about subject matter jurisdiction. The parties to the third party claims apparently agree that the Court has subject matter jurisdiction over these claims. But the Court is not bound by that agreement,

and must independently determine whether it has subject matter jurisdiction.¹

For the reasons stated below, it appears that this Court lacks subject matter jurisdiction over the claims in the third party complaint. Those claims are state-law claims that are being asserted by parties who are neither the debtor nor the trustee in the bankruptcy case (“non-debtors”) against a non-debtor, and it appears that such claims will have no impact on the bankruptcy estate or the administration of the Chapter 7 bankruptcy case.

In considering subject matter jurisdiction, the Court notes the following. First, this Court has explained that under 28 U.S.C. § 1334(b),

[t]his Court has subject matter jurisdiction over ‘all cases under title 11,’ and over ‘all civil proceedings’ (1) ‘arising under title 11’ or (2) ‘arising in’ a case under title 11 or (3) ‘related to’ a case under title 11.

¹ As this Court stated previously in another case:

The parties cannot create subject matter jurisdiction by mere admission or stipulation. “[F]ederal courts are courts of limited jurisdiction and have a continuing obligation to examine their subject matter jurisdiction throughout the pendency of every matter before them. Parties can neither waive nor consent to subject matter jurisdiction [.]” *Michigan Employment Sec. Comm’n v. Wolverine Radio Co., Inc.*, 930 F.2d 1132, 1137–38 (6th Cir.1991) (citation and footnote omitted); *see also Spierer v. Federated Dept. Stores, Inc. (In re Federated Dept. Stores, Inc.)*, 328 F.3d 829, 833 (6th Cir.2003)(“‘parties may not waive ... or consent to subject matter jurisdiction which a federal court does not properly have.’”)(quoting *Universal Consol. Cos. v. Bank of China*, 35 F.3d 243, 247 (6th Cir.1994)). Rather, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed.R.Civ.P. 12(h)(3).

Allard v. Coenen (In re Trans-Industries, Inc.), 419 B.R. 21, 28-29 (Bankr. E.D. Mich. 2009)(footnote omitted); *see also Swain v. United States Dept’t of Treasury, I.R.S. (In re Swain)*, 437 B.R. 549, 554-55 (Bankr. E.D. Mich. 2010)(same); *CMS North America, Inc. v. DeLorenzo Marble & Tile, Inc.*, 521 F. Supp. 2d 619, 632 (W.D. Mich. 2007), and cases cited therein.

A “case under title 11” refers “merely to the bankruptcy petition itself, filed pursuant to 11 U.S.C. §§ 301, 302, or 303.” *Michigan Employment Sec. Comm'n v. Wolverine Radio Co., Inc.*, 930 F.2d 1132, 1140 (6th Cir.1991).

...

“The phrase ‘arising under title 11’ describes those proceedings that involve a cause of action created or determined by a statutory provision of title 11, and ‘arising in’ proceedings are those that, by their very nature, could arise only in bankruptcy cases.” *Bliss Technologies, Inc. v. HMI Indus., Inc. (In re Bliss Technologies, Inc.)*, 307 B.R. 598, 602 (Bankr. E.D. Mich.2004)(quoting *Wolverine Radio*, 930 F.2d at 1144). These two categories of civil proceedings are “core” proceedings within the meaning of 28 U.S.C. §§ 157(b)(1) and 157(b)(2). *Id.* . . .

Civil proceedings that fall only within the third category of the bankruptcy court's subject matter jurisdiction-its “related to” jurisdiction-are non-core. . . .

The Sixth Circuit has adopted the test articulated in *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 994 (3d Cir.1984), for determining “related to” jurisdiction:

“The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.”

Allard v. Coenen (In re Trans-Industries, Inc.), 419 B.R. 21, 26-28 (Bankr. E.D. Mich. 2009)(footnotes omitted).

Second, this Court discussed subject matter jurisdiction, including “related to”

jurisdiction, in *Swain v. United States Dep't of Treasury, I.R.S. (In re Swain)*, 437 B.R. 549

(Bankr. E.D. Mich. 2010). In that case, the Court explained:

[T]he Sixth Circuit has adopted the *Pacor* test for determining whether a proceeding is “related to” the bankruptcy case. The test for such “related to” jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a) is “whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.” The test requires that the proceeding in some way can “impact [] upon the handling and administration of the bankrupt estate.” See . . . also *Community Bank of Homestead v. Boone (In re Boone)*, 52 F.3d 958, 960, 961 (11th Cir.1995)(“related to” jurisdiction requires that a bankruptcy debtor’s claim “must affect the estate, not just the debtor”).

Swain, 437 B.R. at 561-62.

Applying the principles discussed above, it appears that there is no “related to” jurisdiction, or any other basis of bankruptcy court subject matter jurisdiction, over the third party claims in this case. Cases that support this conclusion include the following:

- *Scott v. Equitable Fed. Savs. and Loan Ass'n (In re German)*, 97 B.R. 373, 375 (Bankr. S.D. Ohio 1989)(Chapter 7 trustee filed an adversary complaint against a savings and loan association, objecting to its proof of claim, and for recovery of a money judgment based on the wrongful repossession and sale of the debtor's mobile home, and the savings and loan association, in turn, filed a third party complaint against its servicing agent for indemnification of any liability that may attach to it as a result of the trustee’s adversary proceeding; the bankruptcy court held that it did not have “related to” subject matter jurisdiction over the third party action between the two non-debtor parties under *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 994 (3d Cir.1984), because the third party action could not be said “to have any effect on [the d]ebtors’ estate or the underlying bankruptcy case”);
- *Barber v. Riverside Int'l Trucks, Inc. (In re Pearson Indus., Inc.)*, 142 B.R. 831, 849–50 (Bankr. C.D .Ill.1992) (citations omitted) (Chapter 7 Trustee filed a preference action against a non-debtor chassis seller, who in turn filed a third party complaint against another non-debtor seeking indemnity or contribution; the bankruptcy court held that where, as in that case, the third party complaint “involved a dispute between non-debtors which [would] merely determine which party [would] ultimately be responsible in the event that one of the nondebtors is found liable in the

underlying adversary proceeding, [subject matter] jurisdiction [was] lacking”); and

- *GLC Limited v. Smith (In re GLC Limited)*, 475 B.R. 618, 620-21 (Bankr. S.D. Ohio 2012)(citations omitted)(Chapter 11 debtor filed an adversary proceeding against an individual defendant, seeking to avoid as a fraudulent transfer, fictitious profits the defendant allegedly received from the debtor’s principals in a Ponzi scheme; and the defendant, in turn, filed a third party complaint for contribution and indemnification against his ex-wife alleging that if a judgment was entered against him in the adversary proceeding, she was liable for half of the fictitious profits; the bankruptcy court held that “[a] third-party action between non-debtors for indemnification of liability to the debtor on the primary complaint is not a related proceeding” and thus the court “[did] not possess jurisdiction to hear the defendant's count for contribution and indemnification” against his ex-wife).

Before the Court makes a final ruling on the issue of subject matter jurisdiction, it will give the parties to the third party action an opportunity to respond in writing to this Order.

Accordingly,

IT IS ORDERED that no later than **July 3, 2014**, the Third Party Plaintiffs and the Third Party Defendant each must file a written response to this Order, showing cause why this Court should not dismiss all of the claims in the third party complaint for lack of subject matter jurisdiction.

If any such party does not timely file such a written response, the Court will assume that such party agrees that this Court lacks subject matter jurisdiction over the third party claims.

By a separate notice to be filed today, the Court will adjourn the bench opinion and the trial control date that are currently scheduled for June 25, 2013, to a date after July 3, 2014.

Signed on June 19, 2014

/s/ Thomas J. Tucker
Thomas J. Tucker
United States Bankruptcy Judge